

TAMARA L. WALBERG,
Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner,
Social Security Administration,
Defendant.

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Case No. C08-956-JCC-JPD

REPORT AND RECOMMENDATION

I. FACTS AND PROCEDURAL HISTORY

REPORT AND RECOMMENDATION
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borderline intellectual functioning, post-traumatic stress disorder, and back conditions.

On January 31, 2005, plaintiff filed an application for SSI. AR at 14. The Commissioner denied plaintiff's claim initially and on reconsideration. AR at 38-45. Plaintiff requested a hearing, which took place on August 7, 2007. AR at 288-308. On October 22, 2007, the ALJ issued a decision finding plaintiff not disabled and denied benefits based on a finding that plaintiff could perform a specific job existing in significant numbers in the national economy, namely a small products assembler, electronics assembler and housekeeper. AR at 11-23.

Plaintiff's administrative appeal of the ALJ's decision was denied by the Appeals Council, AR at 6-8, making the ALJ's ruling the "final decision" of the Commissioner as that term is defined by 42 U.S.C. § 405(g). A timely complaint for judicial review was filed by the plaintiff challenging the Commissioner's decision. Dkt. No. 3.

II. JURISDICTION

Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3).

III. STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social security benefits when the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 201 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a whole, it may neither reweigh the evidence nor substitute its

judgment for that of the Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is susceptible to more than one rational interpretation, it is the Commissioner's conclusion that must be upheld. *Id.*

The Court may direct an award of benefits where "the record has been fully developed and further administrative proceedings would serve no useful purpose." *McCartey v. Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996)). The Court may find that this occurs when:

(1) the ALJ has failed to provide legally sufficient reasons for rejecting the claimant's evidence; (2) there are no outstanding issues that must be resolved before a determination of disability can be made; and (3) it is clear from the record that the ALJ would be required to find the claimant disabled if he considered the claimant's evidence.

Id. at 1076-77; *see also Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (noting that erroneously rejected evidence may be credited when all three elements are met).

IV. EVALUATING DISABILITY

As the claimant, Ms. Walberg bears the burden of proving that she is disabled within the meaning of the Social Security Act (the "Act"). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999) (internal citations omitted). The Act defines disability as the "inability to engage in any substantial gainful activity" due to a physical or mental impairment which has lasted, or is expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under the Act only if her impairments are of such severity that she is unable to do her previous work, and cannot, considering her age, education, and work experience, engage in any other substantial gainful activity existing in the national economy. 42 U.S.C. §§ 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

The Commissioner has established a five step sequential evaluation process for determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§ 404.1520, 416.920. The claimant bears the burden of proof during steps one through four.

01 At step five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled
02 at any step in the sequence, the inquiry ends without the need to consider subsequent steps.

03 Step one asks whether the claimant is presently engaged in “substantial gainful
04 activity.” 20 C.F.R. §§ 404.1520(b), 416.920(b).¹ If she is, disability benefits are denied. If
05 she is not, the Commissioner proceeds to step two. At step two, the claimant must establish
06 that she has one or more medically severe impairments, or combination of impairments, that
07 limit her physical or mental ability to do basic work activities. If the claimant does not have
08 such impairments, she is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant
09 does have a severe impairment, the Commissioner moves to step three to determine whether
10 the impairment meets or equals any of the listed impairments described in the regulations. 20
11 C.F.R. §§ 404.1520(d), 416.920(d). A claimant whose impairment meets or equals one of the
12 listings for the required twelve-month duration requirement is disabled. *Id.*

13 When the claimant’s impairment neither meets nor equals one of the impairments
14 listed in the regulations, the Commissioner must proceed to step four and evaluate the
15 claimant’s residual functional capacity (“RFC”). 20 C.F.R. §§ 404.1520(e), 416.920(e).
16 Here, the Commissioner evaluates the physical and mental demands of the claimant’s past
17 relevant work to determine whether she can still perform that work. 20 C.F.R. §§
18 404.1520(f), 416.920(f). If the claimant is able to perform her past relevant work, she is not
19 disabled; if the opposite is true, then the burden shifts to the Commissioner at step five to
20 show that the claimant can perform other work that exists in significant numbers in the
21 national economy, taking into consideration the claimant’s RFC, age, education, and work
22 experience. 20 C.F.R. §§ 404.1520(g), 416.920(g); *Tackett*, 180 F.3d at 1099, 1100. If the
23 Commissioner finds the claimant is unable to perform other work, then the claimant is found
24 disabled and benefits may be awarded.

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26 ¹ Substantial gainful activity is work activity that is both substantial, i.e., involves
significant physical and/or mental activities, and gainful, i.e., performed for profit. 20 C.F.R.
§ 404.1572.

01 V. DECISION BELOW

02 On October 22, 2007, the ALJ issued a decision finding the following:

- 03 1. The claimant has not engaged in substantial gainful activity since
04 January 31, 2005, the application date (20 C.F.R. 416.920(b) and
416.971, et seq.).
- 05 2. The claimant has the following severe impairments: affective disorder,
06 anxiety disorder, possible borderline intellectual functioning, substance
07 abuse in partial remission, and a back impairment (20 C.F.R.
416.920(c)).
- 08 3. The claimant does not have an impairment or combination of
09 impairments that meets or medically equals one of the listed
10 impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1 (20 C.F.R.
416.920(d), 416.925 and 416.926).
- 11 4. After careful consideration of the entire record, I find that claimant has
12 the residual functional capacity to perform light work. She is able to
13 lift 20 pounds occasionally, 10 pounds frequently, stand or walk for
14 about six hours, and sit for about six hours during an eight hour work
day. As to her mental abilities, she can perform one to two step tasks
on a regular basis compatible with unskilled and entry level semi-
skilled work. She can work with a few coworkers and a supervisor, in
jobs not dealing directly with the general public. She can deal with
changes within a routine work setting.
- 15 5. The claimant has no past relevant work (20 C.F.R. 416.965).
- 16 6. The claimant was born on XXXXX², 1967, and was 37 years old,
17 which is defined as a younger individual age 18-49, on the date the
application was filed (20 C.F.R. 416.963).
- 18 7. The claimant has a limited education and is able to communicate in
19 English (20 C.F.R. 416.964).
- 20 8. Transferability of job skills is not an issue because the claimant does
not have past relevant work (20 C.F.R. 416.968).
- 21 9. Considering the claimant's age, education, work experience, and
22 residual functional capacity, there are jobs that exist in significant
23 numbers in the national economy that the claimant can perform (20
C.F.R. 416.960(c) and 416.966).
- 24 10. The claimant has not been under a disability, as defined in the Social Security
25 Act, since January 31, 2005, the date the application was filed (20 C.F.R.
416.920(g)).

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² The actual date is deleted in accordance with Local Rule CR 5.2, W.D. Washington.

01 AR at 16-23.

02 VI. ISSUES ON APPEAL

03 The principal issues on appeal are:

- 04 1. Did the ALJ err in his assessment of whether the plaintiff's
- 05 impairments met Listing of Impairments §12.05C?
- 06 2. Did the ALJ err in his adverse credibility assessment?
- 07 3. Did the ALJ err in his assessment of the plaintiff's RFC?
- 08 4. Did the ALJ err in his Step 5 analysis?

09 Dkt. No. 12.

10 VII. DISCUSSION

11 A. The ALJ Erred in His Assessment of Whether the Plaintiff's Impairments Met Listing 12.05(C)

12 Step 3 of the sequential evaluation process requires the ALJ to determine whether
13 plaintiff's impairment meets or equals any of the listed impairments described in the
14 regulations. 20 C.F.R. §§ 404.1520(d), 416.920(d). The listings describe specific
15 impairments in each of the body's major systems that are considered "severe enough to
16 prevent a person from doing most gainful activity." See 20 C.F.R. §§ 404.1525, 416.925(a).
17 Severe impairments must be "permanent or expected to result in death," or must last or be
18 expected to last for a continuous period of at least twelve months. 20 C.F.R. §§ 404.1525(a),
19 416.925(a). The ALJ's analysis at step 3 must rely only on medical evidence and not rely on
20 age, education or work experience. 20 C.F.R. §§ 404.1520(d), 416.920(d); *see also Bates v.*
21 *Barnhart*, 222 F. Supp. 2d 1252, 1258 (D. Kan. 2002). To be found disabled at step 3,
22 plaintiff must prove that she meets or equals each of the characteristics of a listed
23 impairment. 20 C.F.R. §§ 404.1525(a), 416.925(a); *see also, Burch v. Barnhart*, 400 F.3d
24 676, 683 (9th Cir. 2005). When a plaintiff suffers from multiple impairments and none of
25 them individually satisfies a listing, an ALJ must consider the collective symptoms, signs,
26 and laboratory findings of all of the claimant's impairments to determine whether plaintiff

meets a listing. *See Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990).

Plaintiff argues that the ALJ erred by finding that she did not meet the 12.05(C) Listing, 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.05(C), for mental retardation at step 3 of the sequential evaluation process. Dkt. No. 12. She argues that her scores on several mental evaluations satisfied the Listing's requirement and that she should therefore have been found disabled. The Commissioner responds that the ALJ properly evaluated the evidence, and that plaintiff did not meet the 12.05(C) Listing because there was no specific mental retardation diagnosis and because the ALJ found that she had no deficits in adaptive functioning that manifested themselves before the age of 22.

The 12.05(C) Listing describes mental retardation as a condition characterized by significantly subaverage general intellectual functioning with deficits in adaptive functioning initially manifested during the developmental period; i.e. . . . before the age of 22. The required level of severity for this disorder is met when the requirements in A, B, C, or D are satisfied . . .

C. A valid verbal, performance, or full scale IQ of 60 *through* 70 and a physical or other mental impairment imposing an additional and significant work-related limitation of function.

20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.05 (emphasis added).

Thus, a 12.05(C) Listing requires an ALJ to find plaintiff satisfies three elements: (1) a valid verbal, performance, or full scale IQ score of 60-70; (2) a physical or other mental impairment; and (3) subaverage general intellectual functioning with evidence of adaptive functioning deficits that manifested themselves before the age of 22.

1. The Plaintiff's IQ Scores Satisfied the 12.05(C) Severity Requirement

Plaintiff took several intelligence tests.³ Dr. Mainz conducted a clinical interview and five subtests from the Wechsler Adult Intelligence Scale-III to "obtain some measure of [Plaintiff's] cognitive functioning." Tr. 122. The results of these tests resulted in

³ The regulations indicate that broad based IQ tests such as the Wechsler series are the preferable test method. 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.00(D)(6)(c). They also state that the Peabody Picture Vocabulary Test may also be appropriate. *Id.* at § 12.00(D)(6)(d).

01 a reported estimated verbal IQ of 70, an estimated performance IQ of 69 and an estimated full
02 scale IQ score of 67. AR at 122, 116. It was, however, Dr. Mainz's "hunch" that, without
03 depression, irritability and upheaval in her life, Ms. Walberg probably functioned within the
04 Borderline range intellectually. AR at 122. In his diagnostic summary, Dr. Mainz reported
05 that Ms. Walberg presented with major depressive episode, single episode of moderate
06 severity, social phobia, and cocaine dependence with two months reported sobriety. AR at
07 117, 122.

08 Dr. Mainz also reported that Ms. Walberg presented with borderline intellectual
09 functioning, and she would probably always have to perform work that is unskilled,
10 repetitive and manual. AR at 123. Regarding functional limitations, Dr. Mainz reported that
11 plaintiff was markedly limited in the ability to learn new tasks, the ability to exercise
12 judgment and make decisions, the ability to perform routine tasks, the ability to relate
13 appropriately to coworkers and supervisors, the ability to interact appropriately in public
14 contacts, and the ability to respond appropriately to and tolerate the pressures and
15 expectations of a normal work setting. AR at 118.

16 The ALJ concluded that the plaintiff failed to present a valid IQ test, relying upon Dr.
17 Mainz's "hunch" and a statement that the testing was administered during a period in which
18 the claimant had recently relapsed into crack cocaine abuse. AR at 19. Neither proffered
19 justification, withstands scrutiny.

20 First, if the ALJ had legitimate concerns about the validity of the test results, it was
21 his responsibility to make sure those concerns were dealt with appropriately by ordering
22 additional tests, rather than relying upon "hunches." It is the obligation of the ALJ to
23 develop the record where there are ambiguities, and if this means requiring the administration
24 of another battery of IQ tests, then this is what should have happened. The ALJ failed in his
25 "duty to fully and fairly develop the record and to assure that the claimant's interests are
26 considered." *See Webb v. Barnhart*, 433 F.3d 683, 687 (9th Cir. 2005) (citations omitted).

01 This duty arises “when the evidence from the treating medical source is inadequate to make a
02 determination as to the claimant’s disability.” 20 C.F.R. § 416.912(e); *see also* SSR 96-5p;
03 *Thomas*, 278 F.3d at 958.

04 Second, the record does not indicate plaintiff had relapsed to cocaine use. It indicated
05 that two months *prior* to the test, she had relapsed, but that she had been clean and sober for
06 two months when she took the tests. AR at 121.

07 Third, when relying upon Dr. Meinz’s hunch and the alleged relapse, the ALJ simply
08 ignored the opinions of treating psychiatrist Molli Hinkle, M.D.⁴ Her first assessment of the
09 plaintiff was after she had experienced a period of being clean and sober for a period of
10 fourteen months. AR at 188. Dr. Hinkle treated the plaintiff for psychiatric problems from
11 December 2004 through August 2005. She initially assessed the plaintiff’s Global
12 Assessment of Functioning (GAF) score at 35. AR at 174.⁵ At various times during her
13

14 ⁴ As a matter of law, more weight is given to a treating physician’s opinion than to that of
15 a nontreating physician because a treating physician “is employed to cure and has a greater
16 opportunity to know and observe the patient as an individual.” *Magallanes*, 881 F.2d at 751; *see*
17 *also Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). A treating physician’s opinion, however,
18 is not necessarily conclusive as to either a physical condition or the ultimate issue of disability, and
19 can be rejected, whether or not that opinion is contradicted. *Magallanes*, 881 F.2d at 751. If an
20 ALJ rejects the opinion of a treating or examining physician, the ALJ must give clear and
21 convincing reasons for doing so if the opinion is not contradicted by other evidence, and specific
22 and legitimate reasons if it is. *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1988). “This can be
done by setting out a detailed and thorough summary of the facts and conflicting clinical evidence,
stating his interpretation thereof, and making findings.” *Id.* (citing *Magallanes*, 881 F.2d at 751).
The ALJ must do more than merely state his conclusions. “He must set forth his own
interpretations and explain why they, rather than the doctors’, are correct.” *Id.* (citing *Embrey v.*
Bowen, 849 F.2d 418, 421-22 (9th Cir. 1988)). Such conclusions must at all times be supported
by substantial evidence. *Reddick*, 157 F.3d at 725.

23 ⁵ The GAF is a subjective determination based on a scale of 1 to 100 of “the clinician’s
24 judgment of the individual’s overall level of functioning.” AMERICAN PSYCHIATRIC ASS’N,
25 DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 32 (Text. Rev., 4th ed. 2000).
26 A GAF score of 51-60 indicates “moderate symptoms,” such as a flat affect, occasional panic
attacks, or “moderate difficulty in social or occupational functioning.” *Id.* at 34. A GAF score
of 41-50 indicates “[s]erious symptoms . . . [or] serious impairment in social, occupational, or
school functioning,” such as the lack of friends and/or the inability to keep a job. *Id.* A GAF

01 treatment plaintiff's GAF score was reported at 45-50 (AR at 175), 40 (AR at 176), 45-50
02 (AR at 180), and 45 (AR at 181, 182, 184, 188). The Commissioner is correct that GAF
03 scores do not equate to a residual functional capacity assessment; however, they are routinely
04 used to assist in assessing the impact of mental impairments on the individual's overall level
05 of functioning. GAF levels in this range should require comment by the ALJ. Instead, rather
06 than providing clear and convincing reasons to reject the opinions and assessments of Dr.
07 Hinkle, the ALJ ignored them. These GAF assessments offer support both for the IQ test
08 results obtained from the tests administered by Dr. Meinz, as well as cast doubt on the
09 justification proffered by the ALJ for failing to recognize the IQ scores as valid.

10 Because the regulations require the ALJ to consider the lowest IQ result in the
11 Wechsler series, plaintiff's verbal IQ of 70, performance range IQ of 69 and full scale IQ of
12 67 falls within the range set forth by 12.05(C). 20 C.F.R. Pt. 404, Subpt. P, App. 1,
13 § 12.00(D)(6)(c). The reasons for rejecting the scores offered by the ALJ are not supported
14 by substantial evidence. Plaintiff therefore satisfied the first prong of 12.05(C)'s severity
15 requirement.

16 2. *The Record Is Undisputed that Plaintiff Suffered from "An*
17 *Additional and Significant Work-Related Limitation of*
Function."

18 An impairment satisfies this requirement when its impact on a claimant's ability to
19 perform basic work activities is more than slight or minimal. *Fanning v. Bowen*, 827 F.2d
20 631, 633 (9th Cir. 1986) (internal citations omitted). A step 2 finding of a severe impairment
21 therefore satisfies this test. *Id.* at n.3 (emphasizing, however, that a specific severity finding
22 is not required to satisfy this standard). Here, the record is undisputed that the plaintiff had
23 physical impairments in addition to her alleged mental retardation. Among other things, the
24 ALJ found plaintiff to suffer from a severe back impairment. AR at 17. She also suffers

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score of 31-40 indicates some impairment in reality testing . . . [or] major impairment in several
areas such as work or school, family relations, judgment, thinking or mood. *Id.*

01 from additional mental impairments that the ALJ found to impact her vocational functioning.
02 AR at 17. Thus, plaintiff also satisfied 12.05(C)'s requirement that she suffer from a
03 "physical or other mental impairment imposing an additional and significant work-related
04 limitation or function."

05 3. *The Plaintiff Had Significant Subaverage General Intellectual*
06 *Functioning and Deficits of Adaptive Functioning that*
 Manifested Themselves Before the Age of 22

07 A 12.05(C) Listing of mental retardation requires the ALJ to find that plaintiff has
08 "significantly subaverage general intellectual functioning with deficits in adaptive
09 functioning initially manifested . . . before the age of 22." 20 C.F.R. Pt. 404, Subpt. P, App.
10 1, § 12.05. While the Ninth Circuit has not yet spoken on what satisfies this diagnostic
11 requirement, other circuits have found IQ to be an important indicator of subaverage
12 intellectual functioning. Additionally, when determining whether claimants demonstrate
13 deficits in adaptive functioning, courts look to a variety of factors that focus on the claimant's
14 ability to lead an independent life.

15 a. Plaintiff's IQ Demonstrates Subaverage Intellectual
16 Functioning Manifesting Before the Age of 22

17 IQ scores are a common indicator of subaverage intellectual functioning. Several
18 circuits have found that plaintiffs create a rebuttable presumption that their developmental IQ
19 was the same as their current IQ when they present a valid IQ score from their post-
20 developmental period. *See, e.g., Branham v. Heckler*, 775 F.2d 1271, 1274 (4th Cir. 1985)
21 (absent contrary evidence, an IQ test taken after the insured period correctly reflects
22 claimant's IQ during the insured period); *accord* *Luckey v. U.S. Dep'. of Health & Human*
23 *Srvs.*, 890 F.2d 666, 668-69 (4th Cir. 1989) (courts should assume IQ remains constant and
24 that an absence of an IQ test during the developmental period does not preclude a finding of
25 retardation); *see also Guzman v. Bowen*, 801 F.2d 273, 275 (7th Cir. 1986) (per curiam) (IQ
26 test taken after expiration of insured period sufficient to establish IQ during insured period);

01 *Muncy v. Apfel*, 247 F.3d 728, 734 (8th Cir. 2001) presuming that a person’s IQ remain stable
02 over time in the absence of any change in intellectual functioning); *but see Foster v. Halter*,
03 279 F.3d 348, 355 (6th Cir. 2001) (upholding ALJ’s finding that claimant was not retarded, in
04 part because plaintiff’s IQ testing was not contemporaneous with her developmental period);
05 *Markle v. Barnhart*, 324 F.3d 182, 188 (3d Cir. 2003) (declining to create such a
06 presumption). The Eleventh Circuit has gone further to find that claimants presumptively
07 meet the 12.05(C) disability requirements when they present a valid IQ score and evidence of
08 an additional impairment. *Hodges v. Barnhart*, 276 F.3d 1265, 1268-69 (11th Cir. 2001).

09 Courts that use evidence of mental retardation from the post-developmental period to
10 raise a rebuttable presumption that the condition existed during the developmental period
11 implicitly base their decisions on the medical fact that, absent some traumatic event,
12 intelligence remains fairly constant throughout one’s life. *See, e.g., Hodges*, 276 F.3d at
13 1268-69.

14 The Commissioner’s own explanation of the 12.05(C) Listing supports this
15 interpretation. In the Federal Register, the Commissioner acknowledged that intelligence
16 testing from the development period should not be required to satisfy the 12.05(C) Listing.
17 According to the Commissioner, the Social Security Administration does “not necessarily
18 require evidence from the developmental period to establish that the impairment began before
19 the end of the developmental period” and has “always interpreted [the term “manifested”] to
20 include the common clinical practice of inferring a diagnosis of mental retardation when the
21 longitudinal history and evidence of current functioning demonstrate that the impairment
22 existed before the end of the developmental period.” Revised Medical Criteria for Evaluating
23 Mental Disorders and Traumatic Brain Injury, 65 Fed. Reg. 50,776-01, 50,753, 50,772 (Aug.
24 20, 2000) (to be codified at 20 C.F.R. §§ 404, 416. This Court believes the rationale adopted
25 in *Hodges* is the correct interpretation of the regulations and adopts it.

26 Here, plaintiff’s IQ scores indicate that she was presumptively mentally retarded

01 during her developmental years. The Wechsler standardized test IQ, administered many
02 years after the age of 22, scored her verbal IQ at 70, her performance range IQ of 69 and her
03 full scale IQ at 67. AR at 122. These facts constitute substantial evidence that plaintiff
04 manifested “evidence of significantly subaverage intellectual functioning” during her
05 developmental period.

06 b. Plaintiff Demonstrated Deficits in Adaptive Functioning

07 When determining whether claimants demonstrate deficits in adaptive functioning,
08 courts look to a variety of factors that focus on the claimant’s ability to lead an independent
09 life. For instance, the Eastern District of Washington has emphasized that a claimant’s
10 participation in special education classes can be indicative of deficits in adaptive functioning.
11 *See Ware ex rel. v. Shalala*, 902 F. Supp. 1262, 1271 (E.D. Wash. 1995). The Third Circuit
12 has also indicated that a claimant’s participation in special education, poor academic
13 performance, and low-skilled work history imply evidence of deficits in adaptive functioning
14 during the developmental period. *See Markle*, 324 F.3d at 189 (remanding for further
15 development of these factors). The Eighth Circuit has as well. *See Christner v. Astrue*, 498
16 F.3d 790, 793 (8th Cir. 2007). Moreover, the Commissioner’s comments on the Listing
17 requirements for 12.05(C) indicate these inquiries are accurate. It indicates that 12.05(C)
18 accommodates the American Psychiatric Association’s analysis of mental retardation, which
19 looks to an individual’s ability to function academically, care for themselves, and live
20 independently. Technical Revisions to Medical Criteria for Determinations of Disability, 67
21 Fed. Reg. 20,018, 20,022 (April 24, 2002) (to be codified at 20 C.F.R. Pt. 404).

22 Here, plaintiff was in special education classes, she eventually dropped out of school
23 in the 11th grade, and has never completed her GED. AR at 121, 113, 294. Plaintiff’s work
24 history also demonstrates evidence of deficits in adaptive functioning. Plaintiff has been
25 unable to hold a job or perform in the workplace. The ALJ found she had no past relevant
26 work. AR at 21. The ALJ concluded that her poor work history, with reported earnings of

01 less that \$19,000 during her entire lifetime, was evidence of lack of motivation to work. AR
02 at 20. While credibility determinations are usually within the province of the ALJ, the
03 findings must be based on substantial evidence. The ALJ has offered nothing to support his
04 conclusion that her poor work history is attributable to lack of motivation as opposed to her
05 underlying mental impairments.

06 Together, plaintiff's IQ, educational history, social functioning, and work history
07 demonstrate that she meets the diagnostic requirements of the 12.05(C) Listing.
08 The ALJ erred when he determined that the plaintiff's impairment did not meet Listing
09 12.05(C).

10 B. The ALJ Erred in His Evaluation of the Plaintiff's RFC

11 The ALJ relied substantially on a portion of Dr. Mainz's assessments of the plaintiff's
12 abilities to find that she was able to function in the work place. AR at 21. However, his RFC
13 did not contain the limitations included by Dr. Mainz. Dr. Mainz opined that the plaintiff
14 could not be around groups of people. He also found that she had marked impairments in her
15 ability to learn new tasks, her ability to exercise judgment and make decisions and her ability
16 to perform routine tasks. AR at 118. The ALJ's RFC took none of these non-exertional
17 impairments into account, when he determined that plaintiff had the ability to "perform one
18 to two step tasks on a regular basis compatible with unskilled and entry level semi-skilled
19 work. She can work with a few coworkers and a supervisor, in jobs not dealing directly the
20 the general public. She can deal with changes within a routine work setting." AR at 19. The
21 ALJ erred in his assessment of the plaintiff's RFC.

22 C. The ALJ Erred at Step 5

23 After a claimant has demonstrated that she has a severe impairment that prevents her
24 from doing her past relevant work, she has made a *prima facie* showing of disability.
25 *Tackett*, 180 F.3d at 1100-01. The burden then shifts to the Commissioner at step 5 to
26 demonstrate that, in light of the claimant's RFC, age, education, and work experience, she
can perform other types of work that exist in "significant numbers" in the national economy.

01 *Id.*; 20 C.F.R. § 404.1560(b)(3).

02 There are two ways that the Commissioner can meet this burden at step 5. First, the
03 ALJ can use the Medical Vocational Guidelines. 20 C.F.R. Pt. 404, Subpt. P, App. 2. When
04 the Guidelines fail to accurately describe a claimant's limitations, however, the ALJ should
05 not rely on them. *Reddick*, 157 F.3d at 729. Instead, the ALJ should use the Guidelines as a
06 framework in conjunction with testimony from a Vocational Expert ("VE"). *Tackett*, 180
07 F.3d at 1101. In this method, the ALJ uses the Guidelines' principles, but has the VE testify
08 as to the claimant's ability to work and the availability of certain jobs that the claimant would
09 be able to perform. *Id.* In such a scenario, the ALJ must provide the VE with an accurate
10 and detailed description of the claimant's impairments, as reflected by the medical evidence
11 of record. *Id.*

12 Here, the ALJ found that the Guidelines could not accurately describe the plaintiff's
13 limitations and thus called a VE to testify. AR at 303-07. However, he failed to pose a
14 hypothetical that included all of plaintiff's impairments. *See* Section VII (B), *supra*. When
15 the limitations included those mentioned by Dr. Mainz, the physician with whom the ALJ
16 relied to conclude the absence of a Listing, the VE testified that there were no jobs in the
17 national economy that could be performed by the plaintiff. AR at 305-07.

18 At step 5, the Commissioner bears the burden of proof to establish that the claimant
19 can perform some other work that exists in significant numbers in the national economy,
20 taking into consideration the claimant's RFC, age, education, and work experience. 20
21 C.F.R. §§ 404.1520(f), 416.920(f); *Tackett*, 180 F.3d at 1100. In this case, the Commissioner
22 failed to satisfy that burden for the reasons set forth above. In such instances, there is no
23 requirement for a remand for taking additional evidence. Rather, a remand with directions to
24 calculate disability benefits to be awarded is appropriate. *McCartey*, 298 F.3d at 1076.

25 D. Remand for Award of Benefits is the Appropriate Relief

26 As discussed above, the Court can either remand for further proceedings or
remand with directions to award benefits. Here, the ALJ failed to mention, let alone provide

01 clear and convincing evidence, to discount the opinions of Dr. Hinkle, the plaintiff's treating
02 psychiatrist. If credited as true, the ALJ would be required to find the plaintiff disabled, as
03 her impairments would meet or equal a Listing. Moreover, as noted above, the failure of the
04 Commissioner to satisfy his burden at step 5 can warrant the reversal of the decision with
05 directions to award benefits. This case was filed more than four years ago. The plaintiff has
06 been largely homeless, moving with her children from shelter to shelter. Nothing would be
07 gained by sending this matter back for further proceedings. Accordingly, the undersigned
08 recommends that this matter be remanded with instructions to award benefits.

09 VIII. CONCLUSION

10 For the foregoing reasons, the Court recommends that this case be REVERSED and
11 REMANDED to the Commissioner for the award of SSI benefits.

12 A proposed order accompanies this Report and Recommendation.

13 DATED this 1st day of April, 2009.

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15 JAMES P. DONOHUE
16 United States Magistrate Judge
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